

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 17.8.101, 17.8.102, )  
17.8.103, 17.8.106, 17.8.110, )  
17.8.302, 17.8.401, 17.8.402, ) (AIR QUALITY)  
17.8.801, 17.8.802, 17.8.818, )  
17.8.819, 17.8.821, 17.8.901, )  
17.8.902, 17.8.905, 17.8.1002, )  
17.8.1201, 17.8.1202, )  
17.8.1204, 17.8.1206, )  
17.8.1212, 17.8.1213, )  
17.8.1214, 17.8.1220, )  
17.8.1224, 17.8.1226, and )  
17.8.1232, pertaining to )  
definitions and incorporation )  
by reference of current )  
federal regulations and other )  
materials into air quality )  
rules )

TO: All Concerned Persons

1. On December 26, 2002, the Board of Environmental Review published MAR Notice No. 17-186 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 3468, 2002 Montana Administrative Register, issue number 24.

2. The Board has amended ARM 17.8.101, 17.8.102, 17.8.103, 17.8.106, 17.8.110, 17.8.401, 17.8.402, 17.8.802, 17.8.818, 17.8.819, 17.8.821, 17.8.901, 17.8.902, 17.8.905, 17.8.1002, 17.8.1201, 17.8.1202, 17.8.1204, 17.8.1206, 17.8.1212, 17.8.1213, 17.8.1214, 17.8.1220, 17.8.1224, 17.8.1226, and 17.8.1232 exactly as proposed and has amended ARM 17.8.302 and 17.8.801, as proposed, but with the following changes (stricken matter interlined, new matter underlined)

17.8.302 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

(a) 40 CFR Part 60, pertaining to standards of performance for new stationary sources and modifications, ~~including the final rule published at 65 FR 76378 on December 6, 2000, "Emission Guidelines for Existing Small Municipal~~

~~Waste Combustion Units", to be codified at 40 CFR Part 60, subpart BBBB;~~

(b) through (4) remain as proposed.

17.8.801 DEFINITIONS In this subchapter, the following definitions apply:

(1) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with (1)(a) through (c) ~~below~~.

(b) through (29) remain as proposed.

3. The following comments were received and appear with the Board's responses:

COMMENT NO. 1: Regarding the proposed amendments to ARM 17.8.101 to eliminate the duplication of statutory language in definitions by citing the definitions in the statute, the U.S. Environmental Protection Agency (EPA) commented that the Board should reference the existing statutory definitions in effect at the time of adoption of these rule amendments by indicating after each MCA citation the following: "(in effect on [insert date])." EPA commented that the statutory definitions should be referenced by a specific date for two reasons: (1) there will be a common understanding of what the Board is adopting with these current rule amendments; and (2) potentially any revisions to statutory definitions could result in revisions to the federally-approved state implementation plan (SIP) without going through the SIP process. This would be inconsistent with section 110(i) of the Federal Clean Air Act, which prohibits states and EPA, except in certain limited circumstances, from taking any action to modify a requirement of a SIP except by SIP revisions.

RESPONSE: The Board has not made the suggested revision. As updated in this rulemaking, ARM 17.8.102(1)(c) states that "unless expressly provided otherwise, in this chapter where the board has referred to a section of the Montana Code Annotated (MCA), the reference is to the 2001 edition of the MCA." This reference is updated by the Board, as necessary, following each biennial session of the Montana Legislature. The Board believes this is sufficient to clearly identify the edition of the MCA that is referenced.

The rule amendment is consistent with the process the Board has followed for many years of updating incorporations by reference by periodically revising the rules to incorporate the most recent edition of the materials incorporated, including statutes. Also, any revisions to statutory definitions apply regardless of whether they are incorporated

into the rules or not. The public and EPA have the opportunity to comment on any proposed legislative revisions to definitions, on any rulemaking before the Board incorporating such revisions, and when any such rule revisions have been submitted to EPA for approval as revisions to the SIP. This is not inconsistent with the SIP revision process.

COMMENT NO. 2: Regarding the deletion of ARM 17.8.101(43), which contains a reference to all definitions contained in 75-2-103, MCA, EPA commented that there are definitions in 75-2-103, MCA, that are not contained in ARM 17.8.101, e.g., advisory council, air contaminant, air pollution, board, department, environmental protection law, principal, and small business statutory source, and suggested that some or all of these definitions should now be contained in ARM 17.8.101 since the reference to the statute is being deleted.

RESPONSE: The Board has not made the suggested revision. The definitions in the Clean Air Act of Montana apply, as a matter of statute, regardless of what the rules state. It is not necessary to repeat this in the rule, and it is not necessary or appropriate to repeat statutory definitions in administrative rules. Section 2-4-305(2), MCA, of the Montana Administrative Procedure Act, states that "rules may not unnecessarily repeat statutory language ...."

COMMENT NO. 3: EPA commented that since the state is revising portions of its stack height rules, EPA reviewed the existing stack height rules in ARM 17.8.401 through 403 and believes additional changes should be made to make the rules consistent with EPA's stack height rules. EPA suggested seven specific revisions to ARM 17.8.401 and 17.8.402.

RESPONSE: The Board has not made the suggested revisions. The Board's intent in proposing revisions to the rules, including ARM 17.8.401 and 17.8.402, was to update internal references, correct minor typographical and grammatical errors, and conform text to current drafting standards. Substantive revisions to ARM 17.8.401 and 17.8.402 would be outside the scope of this rulemaking.

COMMENT NO. 4: EPA commented that the reference to 65 FR 76378 in ARM 17.8.302 should be deleted from the rule because adoption of the 2002 CFR includes the regulation as codified in the CFR.

RESPONSE: The Board agrees with the comment and has amended the rule as shown above.

COMMENT NO. 5: EPA commented that the word "below" in ARM 17.8.801(1) should be deleted to be consistent with other proposed amendments.

RESPONSE: The Board agrees with the comment and has amended the rule as shown above.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_ By: \_\_\_\_\_

\_\_\_\_\_  
DAVID RUSOFF  
Rule Reviewer

JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2003.